

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY J. STOKES,

Defendant-Appellant.

UNPUBLISHED

July 29, 2003

No. 235905

Wayne Circuit Court

LC No. 00-010818 - 01

Before: Wilder, P.J., and Griffin and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for assault with intent to do great bodily harm less than murder, MCL 750.84, assault with intent to murder, MCL 750.83, first-degree home invasion, MCL 750.110(a)(2), and felony-firearm, MCL 750.227b. Defendant was sentenced to 5 to 10 years in prison for the assault with intent to do great bodily harm less than murder conviction, 25 to 40 years on the conviction for assault with intent to murder, 7 1/2 to 20 years for the home invasion conviction, and 2 years on the felony-firearm charge. Defendant's home invasion sentence was made consecutive to the two assault convictions while the felony-firearm sentence is to be served prior and consecutive to all other sentences. We affirm all of defendant's convictions, and remand for correction of the sentencing information reports on the home invasion and assault with intent to do great bodily harm less than murder convictions.

Defendant first contends that he was denied effective assistance of counsel when his attorney failed to request that defendant be evaluated for criminal responsibility. We disagree. Our review of this issue is limited to alleged errors by counsel evident in the existing trial record, *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2002), because defendant failed to preserve this issue for our review by moving for a new trial or evidentiary hearing in the trial court. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

To establish a denial of effective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficiency was prejudicial to the defendant. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant claims his trial attorney should have pursued a psychiatric evaluation for him before trial because defendant had exhibited behavior warranting such an evaluation. For purposes of determining whether defendant was denied effective assistance of counsel, we consider whether the omission of the evaluation denied defendant the opportunity to present an insanity defense that had a reasonable

likelihood of success. *People v Nyberg*, 140 Mich App 160, 165-166; 362 NW2d 748 (1984). There is little evidence in the trial record to conclude an insanity defense would have had even a narrow possibility of success. One police officer testified that the victim had mentioned that defendant was suicidal. Another police officer testified that the victim had told him she had received a threatening message from defendant that he was going to kill her and then himself.

Unless defendant has an extensive history of mental instability, a trial counsel's failure to pursue a psychiatric evaluation or raise an insanity defense does not constitute ineffective assistance of counsel. *People v Parker*, 133 Mich App 358, 363; 349 NW2d 514 (1984). Because the evidence in this case fails to establish such an extensive history, defendant cannot show either that trial counsel's failure to pursue a criminal responsibility evaluation constituted deficient performance, or that he suffered any prejudice because he was not evaluated. *Id.*

Defendant next argues in propria persona that the prosecutor failed to exercise due diligence in securing the presence of a res gestae witness, Officer Mitchell of the Detroit Police Department, and that the jury instruction given by the trial court, that the jury could infer that as a missing witness, Officer Mitchell would have testified unfavorably to the prosecution, was insufficient to cure the prejudice created by the Officer Mitchell's absence. We disagree.

The prosecutor's duty with respect to res gestae witnesses is not as broad as that asserted by the defendant. As we held in *People v Perez*, 255 Mich App 703, 710; 622 NW2d 446 (2003), MCL 767.40a(1) and (2) require the prosecution to list any such witnesses actually known to the prosecution at the time the information is filed and up to the time of trial, and MCL 767.40a(3) requires the prosecution to provide defendant with a list of the witnesses the prosecution intends to call at trial not less than 30 days before trial. "MCL 767.40a(5) requires the prosecutor and the police to provide the defendant with assistance "to locate and serve process upon a witness" at the defendant's request," but does not actually impose a duty on the prosecution to produce the witness. *Id.* MCL 767.40a imposes no duty on the prosecution with respect to a res gestae witness once the prosecution has subpoenaed that witness, and the statute does not penalize the prosecution when the subpoenaed witness fails to honor the subpoena. *Id.*

In the present case, the prosecution subpoenaed Officer Mitchell almost two months in advance of trial and did not learn until just prior to trial that he had been furloughed from the department. Despite attempts to contact him at his home, the prosecution was unable to reach him personally. Eventually, the prosecution was advised that Officer Mitchell was on vacation and would not return until the trial had been completed. The trial court instructed the jury that it could infer Officer Mitchell's testimony would be unfavorable to the prosecution. Pursuant to *Perez* and MCL 767.40a, once the prosecution subpoenaed Officer Mitchell for trial it had no obligation to do anything to produce him for trial. Thus, defendant was not prejudiced by any conduct of the prosecution. Moreover, the trial court's instruction to the jury that it could infer that Officer Mitchell would have testified favorably to the defendant, even though defendant was not entitled to this instruction, actually inured to defendant's benefit as he was acquitted by the jury of the charge that he assaulted Officer Mitchell with the intent to murder. We find no error requiring reversal.

Defendant last argues that he was denied effective assistance of counsel because he was sentenced on the assault with intent to do great bodily harm less than murder and first-degree home invasion convictions based upon incorrect sentencing guidelines. We disagree. Because

the current offenses occurred in August 2000, the Michigan statutory sentencing guidelines apply as set forth at MCL 777.1 *et seq.* Under the sentencing guidelines act, a court must impose a sentence in accordance with the appropriate sentence range. MCL 769.34(2), *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001).

The record shows that defense counsel and prosecutor agreed at the sentencing hearing the offense variables would be scored as follows: OV1, 25 points; OV2, five points; OV3, zero points; OV4, ten points; OV5, zero points; OV6, 50 points; OV7, zero points; OV8, zero points; OV9, 10 points; OV10, 15 points. As the points for OV6 do not apply to the first-degree home invasion and assault with intent to do great bodily harm less than murder convictions, defendant's offense variable point total is 65 on these two convictions (Grid D-V). Therefore, the guideline ranges of 29 to 71 months on the assault conviction, and 78 to 162 months on the home invasion conviction, were correctly calculated and applied by the trial court. Because the sentences imposed were within the proper guidelines ranges, defendant is not entitled to relief. *People v Babcock*, 244 Mich App 64, 73; 624 NW2d 479 (2000)(*Babcock I*); MCL 769.34(10).

Defendant's convictions are affirmed, and we remand for correction of the sentencing information reports for the home invasion and assault with intent to do great bodily harm less than murder convictions. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Hilda R. Gage